

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Northern Division.

FILED
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F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

- F. R. JEFFREY, U. S. Attorney, Spokane, Washington,
- H. SYLVESTER GARVIN, Assistant U. S. Attorney, Spokane, Washington,
Attorneys for Plaintiff and Defendant in Error.
- E. W. ROBERTSON, Hyde Building, Spokane, Washington,
Attorney for Defendant and Plaintiff in Error. [2*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOE DURICH,
Defendant.

Information.

H. SYLVESTER GARVIN, Assistant United States Attorney for the Eastern District of Washington, who for the said United States and in this behalf prosecutes in his own proper person, comes into court on this 6th day of September, in the

*Page-number appearing at foot of page of original certified Transcript of Record.

year 1923, and with leave of the Court first had and obtained and upon his official oath gives the Court here to understand and to be informed as follows:

COUNT I.

That JOE DURICH, whose other or true name is unknown, late of the county of Spokane, State of Washington, heretofore, to wit: on or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully have and posess certain intoxicating liquor, to wit: about one (1) pint of a certain spirituous liquor then and ther containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [3]

COUNT II.

And the Assistant United States Attorney for the Eastern District of Washington further informs the Court:

That JOE DURICH, whose other or true name is unknown, late of the county of Spokane, State of Washington, heretofore, to wit: on or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this court, did then and there wilfully, knowingly and unlawfully sell to one Leonard Regan a cer-

tain quantity of spirituous liquor, the exact amount of which is to the said Assistant United States Attorney unknown, then and there containing more than one-half of one per centum of alcohol per volume, and then and there being fit for beverage purposes, and which said sale by the said Joe Durich, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

H. SYLVESTER GARVIN,
Assistant United States Attorney. [4]

United States of America,
Eastern District of Washington,—ss.

H. Sylvester Garvin, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting Assistant United States Attorney for the Eastern District of Washington and that he makes this verification as such; that he has read the above and foregoing information, knows the contents thereof and the same is true as he verily believes; probable cause of action established by the United States Commissioner and defendant bound over to the Grand Jury.

H. SYLVESTER GARVIN.

Subscribed and sworn to before me this sixth day of September, A. D. 1923.

ALAN G. PAINE,
Clerk, United States District Court, Eastern District of Washington.

Let process issue.

Dated this 6th day of September, A. D. 1923.

J. STANLEY WEBSTER,
Judge.

Bond fixed at \$_____.

Filed in the U. S. District Court, Eastern District of Washington. Sept. 7, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [5]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

Demurrer.

Comes now the defendant in the above-entitled action and demurs to the information upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

II.

Defendant demurs to count 1 of the indictment upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

III.

Defendant demurs to count 2 of the indictment upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

E. W. ROBERTSON,
Attorney for Defendant.

H. SYLVESTER GARVIN,
Asst. U. S. Attorney.

10/9/23.

Filed in the U. S. District Court, Eastern District of Washington. October 9, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [6]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

Order Overruling Demurrer.

This matter coming regularly on to be heard upon the demurrer of defendant to the information, and the Court having heard the argument of counsel and being fully advised in the premises;

IT IS ORDERED that the said demurrer be and the same hereby is overruled.

The defendant excepts; and an exception is allowed.

Done in open court this 9th day of October, 1923.

J. STANLEY WEBSTER,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 15, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [7]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant Joe Dukich Guilty as to the First Count;

Guilty as to the Second Count; as charged in the Information.

C. HERBERT MOORE,
Foreman.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 9, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [8]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Petition for New Trial.

Comes now the defendant and petitions the Court to vacate and set aside the verdict of the jury herein and the judgment of the Court pronounced thereon, and to grant the defendant a new trial upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict and judgment rendered thereon.

II.

Error in law occurring at the trial.

The evidence was insufficient in that it related to purchases of intoxicating liquor from one Mar-

tin and possession by him or other persons and not to any sales of intoxicating liquor or possession of intoxicating liquor by the defendant.

That the errors in law occurring at the trial were as follows:

The denial by the Court of the motion to strike the evidence relating to sales of intoxicating liquor by said Martin.

The information having alleged a sale by the defendant and not by Martin, this was a fatal variance, and the information did not inform defendant of the nature and cause of the accusation against him.

Several sales were shown by Martin and no election made, and there being only one charge of a sale, it was error not to strike such evidence. [9]

The Court further erred in failing to strike the evidence of the possession of a pint of moonshine whiskey by Martin because of a fatal variance between the information and such evidence and because the said information did not inform defendant of the nature and cause of the accusation against him.

The Court erred in denying the motion for a directed verdict of not guilty upon the first count of the information.

The Court erred in denying the motion for directed verdict of not guilty upon the second count of the information.

That the Court erred in instructing the jury as follows:

“ . . . and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place intoxicating liquor in question, that in law, would amount to the possession of Mr. Dukich.”

That the Court erred in instructing the jury as follows:

“ . . . In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale.”

That the Court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence as Martin

was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor.” [10]

That the Court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty.”

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 19, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [11]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Order Denying Petition for New Trial.

This matter coming regularly on for hearing upon the petition of defendant to set aside the judgment and to grant him a new trial, and the Court having heard the argument of counsel and being fully advised in the premises;

IT IS ORDERED that the said petition be and the same is hereby denied.

Defendant excepts; exception allowed.

Done in open court this 20th day of October, 1923.

J. STANLEY WEBSTER,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [12]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Motion to Arrest Judgment.

Comes now the defendant in the above-entitled cause and moves the Court to arrest judgment upon the verdict of the jury herein upon the grounds and for the reasons:

I.

That the facts as stated in the information do not constitute a crime or misdemeanor against the United States.

II.

That the facts as stated in count 1 of the information do not state facts sufficient to constitute a crime against the United States.

III.

That the facts as stated in count 2 of the information do not constitute a crime against the United States.

IV.

That count 2 of the information, particularly in view of the evidence introduced in support thereof,

is duplicitous and charges more than one offense, all of which offenses were submitted to the jury under said count.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 15, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [13]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff;

vs.

JOE DUKICH,

Defendant.

Order Denying Motion in Arrest of Judgment.

This matter coming regularly on to be heard upon the motion of the defendant in arrest of judgment, it having been stipulated between the said parties that argument on the said motion might be had after rendition of the judgment, and the Court having heard said argument and being fully advised in the premises;

IT IS ORDERED that the said motion be and the same hereby is denied.

Defendant excepts; and an exception is allowed.

Done in open court this 20th day of October,
1923.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [14]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Sentence.

Now, on this 13th day of October, A. D. 1923, into court comes the above-named defendant for sentence, and being informed by the Court of his conviction herein of record, he is asked by the Court if he has any legal cause to show why the judgment of this Court should not now be pronounced in his case, he nothing says, save as he before hath said.

WHEREUPON it is now by the Court CONSIDERED and ADJUDGED upon the verdict of the jury of guilty, that said defendant now before

the Court, is guilty, and it is further ORDERED and ADJUDGED that said defendant be confined in the Spokane County Jail, State of Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of six months from this date, and to pay a fine of five hundred dollars, to stand committed until he is duly discharged by law, and now the said defendant is committed to the custody of the Marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 13, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Order Extending Time for Filing Bill of Exceptions.

Upon the application of defendant for an extension of time in which to present, serve and file

his bill of exceptions herein, it appearing that the Court by stipulation of the parties in open Court and within ten days of the rendition of the verdict, had extended such time until the hearing of the petition for a new trial, and plaintiff consenting hereto;

IT IS ORDERED that the time in which defendant may present, serve and file his bill of exceptions be and the same hereby is extended to and including December 7, 1923.

Done in open court this 20th day of October, 1923.

J. STANLEY WEBSTER,
Judge.

O. K.—H. SYLVESTER GARVIN,
Asst. U. S. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [16]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOE DUKICH,
Defendant.

Petition for Writ of Error.

Comes now Joe Dukich, defendant herein, and says: That on or about the 13th day of October, 1923, this Court entered sentence and judgment against the defendant, Joe Dukich, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

WHEREFORE, the said Joe Dukich prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of, and that the Court fix the bond to operate also as a *supersedeas*, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [17]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Order Allowing Writ of Error.

On this 20th day of October, 1923, came the defendant, Joe Dukich, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error, intended to be urged by him, and prayed that the bond to be given to operate also as a *supersedeas* and stay bond, be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which judgment and sentence herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof, the Court does allow the writ of error, and the bond for such writ of error and also to operate as a *supersedeas*, is fixed in the sum of \$1,000.00, and upon defendant giving such bond, all proceedings to enforce said sentence and

judgment to be stayed, until such writ of error is determined.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [18]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings as also in the rendition of judgment and sentence on a plea, which in the said District Court before you, or some of you, between Joe Dukich, plaintiff in error (defendant in the lower court), and the United States of America, defendant in error (plaintiff in the lower court), manifest error hath happened, to the

great damage of the said Joe Dukich, plaintiff in error as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf duly command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done. [19]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 20th day of October, 1923, in the year of our Lord one thousand nine hundred twenty-three.

ALAN G. PAYNE,
Clerk of the United States District Court, for the
Eastern District of Washington, Northern
Division.

Allowed by:

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [20]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Assignment of Errors.

Comes now the above-named defendant and herein files his assignment of errors committed by the trial judge in the proceedings and trial of the above-entitled cause, to wit:

I.

That the Court erred in overruling the demurrer to the information.

II.

That the Court erred in overruling the demurrer to the first count of the information.

III.

That the Court erred in overruling the demurrer to the second count of the information.

IV.

That the Court erred in refusing to strike the evidence relating to the sales of intoxicating liquor

by one Martin for the reason that the information charged a sale by the defendant and did not name or otherwise refer to the said Martin, and such evidence constituted a fatal variance from the information, and the information did not apprise defendant of the nature and cause of the accusation against him. [21]

V.

That the Court erred in denying the motion to strike the evidence relating to the possession of a pint of moonshine whiskey by the said Martin, or others, for the reason that the information charged possession by the defendant and did not refer to the said Martin or others, and that this evidence constituted a fatal variance from the information, and the information did not inform defendant of the nature and cause of the accusation against him.

VI.

That the Court erred in denying the motion of the defendant for a directed verdict of not guilty as to the first count of the information.

VII.

That the Court erred in denying the motion of the defendant for a directed verdict of not guilty as to the second count of the information.

VIII.

That the Court erred in instructing the jury as follows:

“ and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the

employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

IX.

That the Court erred in instructing the jury as follows:

" . . . In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale." [22]

X.

That the Court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion the man referred to in the evidence as Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bar-

tender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor.”

XI.

That the Court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty.”

XII.

That the Court erred in denying the motion of defendant in arrest of judgment for the reasons set forth in said motion in arrest of judgment, to which reference is herein made.

XIII.

That the Court erred in denying defendant’s petition to set aside the verdict and vacate the judgment

upon the grounds and reasons stated in the said petition, to which reference is hereby made.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [23]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Joe Dukich, as principal, and the American Surety Company of New York, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of \$1000.00 to be paid to the United States of America, to which payment well and truly to be paid, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, in the year of our Lord one thousand nine hundred twenty-three.

Whereas, lately at the September term, A. D. 1923, of the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit pending in said court, between the United States of America, plaintiff, and Joe Dukich, defendant, a judgment and sentence was rendered against the said Joe Dukich, and the said Joe Dukich has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit at the City of San Francisco, State of California, 30 days from and after the date of said citation, which citation has been duly served.

[24]

Now, the condition of the above obligation is such that if the said Joe Dukich shall appear, either in person or by attorney, in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause, in said court, and prosecutes his said writ of error, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, or the writ of error or appeal is dismissed; and if he shall appear for trial in the District Court

of the United States, for the Eastern District of Washington, Northern Division, on such day or days as may be appointed for a retrial, by said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

JOE DUKICH,
Principal.

AMERICAN SURETY COMPANY OF
NEW YORK.

By W. L. BERRY,
Res. Vice-President.

Attest: E. F. KIDD,
Resident Assistant Secretary.

Bond approved this 20th day of Oct., 1923.

J. STANLEY WEBSTER,
Judge.

Approved as to form:

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [25]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

**Stipulation Re Transmission of Original Bill of
Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, through their respective attorneys, that the clerk of the above-named court may forward to the Circuit Court of Appeals of the Ninth Circuit the original bill of exceptions, now on file with said clerk.

Dated at Spokane, Washington, this 13th day of November, 1923.

H. SYLVESTER GARVIN,
Attorney for Plaintiff, Asst. U. S. Attorney.
E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington, Nov. 13, 1923. Alan G. Paine,
Clerk. By Eva M. Hardin, Deputy. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Citation on Writ of Error.

The President of the United States, to the United States of America, and the Messrs. F. R. JEFFREY and H. SYLVESTER GARVIN, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error, regularly issued, and which is on file in the office of the clerk of the District Court of the United States, for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein Joe Dukich is plaintiff in error (defendant in the lower court), and the United States of America, is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error men-

tioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 20 day of October, 1923.

J. STANLEY WEBSTER,
United States District Judge.

Due and legal notice of above citation acknowledged and copy thereof received this 20 day of October, 1923.

F. R. JEFFREY,
U. S. District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [27]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Praeclipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court

of Appeals, Ninth Judicial Circuit, the following papers and records in the above-entitled cause.

1. Information.
2. Demurrer to the information.
3. Order overruling demurrer to information.
4. Verdict of the jury.
5. Motion for new trial.
6. Order overruling motion for new trial.
7. Motion in arrest of judgment.
8. Order overruling motion in arrest of judgment.
9. Judgment and sentence of the Court.
10. Order extending time for filing bill of exceptions.
11. Petition for writ of error.
12. Order allowing writ of error and fixing bond.
13. Writ of error.
14. Assignments of error.
15. Bond and approval thereof.
16. Stipulation re transmission of original bill of exceptions.
17. Citation.
18. Praeclipe for transcript of record.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 13, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [28]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, do hereby certify that the foregoing pages constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action, as called for in defendant's praecipe for transcript, and as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 20th day of October, 1923. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of Nine and 50/100 (\$9.50) Dollars, and that the same

has been paid in full by the defendant, and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in said Eastern District of Washington, Northern Division, in the [29] Ninth Judicial Circuit, this 15th day of November, 1923, A. D., and the Independence of the United States of America, the one hundred and forty-eighth.

[Seal] Attest: ALAN G. PAINE,
Clerk of the United States District Court for the
Eastern District of Washington. [30]

In the District Court of the United States in and for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Notice.

To the Above-named Plaintiff and to Messrs. F. R. Jeffrey and H. Sylvester Garvin, Your Attorneys:

You, and each of you, are hereby notified that the above-named defendant has prepared and filed with the clerk of the above-entitled court a pro-

posed bill of exceptions, a copy of which is herewith served upon you.

You are further notified that said defendant will, at the time said bill of exceptions is certified, ask the Court to order attached and made a part of said bill of exceptions all of the exhibits received or offered in evidence on the trial, which are not already a part hereof.

Dated at Spokane, Washington, this 13th day of November, 1923.

E. W. ROBERTSON,
Attorney for Defendant.

Service of the above and foregoing notice and of the bill of exceptions attached thereto, by true copy thereof, is hereby acknowledged this 13th day of November, 1923.

H. SYLVESTER GARVIN,
Asst. U. S. District Attorney. [31]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Bill of Exceptions.

Before the Honorable J. STANLEY WEBSTER,
District Judge.

APPEARANCES:

For the Plaintiff: H. SYLVESTER GARVIN,
Asst. U. S. District Attorney.

For the Defendant: E. W. ROBERTSON.

BE IT REMEMBERED, that the above-entitled cause came on regularly for hearing in the above-entitled court on Tuesday, October 9, 1923, at 2:00 o'clock, P. M., before the Hon. J. Stanley Webster, District Judge, the plaintiff appearing by H. Sylvester Garvin, Assistant United States District Attorney, and the defendant appearing in person and by his attorney, E. W. Robertson, thereupon the following proceedings were had and done, to wit:

THEREUPON a jury was duly empaneled and sworn to try the cause.

OPENING STATEMENT.

Mr. GARVIN.—If the Court please, and Gentlemen of the jury: The Government will show in this case that on the day in question Prohibition Agents Edholm and Regan went down to the bar that was conducted at that time by the defendant in this case; the bar was known as the Marga Bar, at 45 Main Avenue, here in the city of Spokane. That on a previous occasion to the day in question, we will establish, or attempt to establish in the proof, that the agents went into that place and met the de-

fendant, who was the owner and proprietor of it; that he, in turn, introduced them to the man who was the bartender behind the bar and upon various occasions intoxicating liquors were sold, and upon that we will expect a verdict of guilty at your hands. [32]

Testimony of Leonard Regan, for the Government.

LEONARD REGAN, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a federal prohibition agent with headquarters at Seattle, and became acquainted with the defendant first meeting him in July, 1923, at his place of business at 45 West Main Street, Spokane. His place is a soft-drink resort. Agent Edholm was with me, and it was about 10:00 P. M. on the 9th. The defendant was standing outside. Agent Edholm and myself were accompanied by another man who we picked up on Main Street in that vicinity. This man spoke to defendant, who followed us in and "sort of nodded to a bartender" who served us three drinks.

Mr. ROBERTSON.—If the Court please, I object to that upon the ground it is a variance from the allegation in the indictment. I want to preserve my objections here and make them timely, without taking up the time of the Court. The allegation of another sale by another party other than this defendant not being charged in this indictment,

(Testimony of Leonard Regan.)

and not being set forth, can not be proved as against this defendant. He is entitled to be informed as to the nature of the accusation and the relations between the parties that may be claimed acted in this matter. I hope, without repeating my objection, your Honor will have it in mind.

The COURT.—I will overrule it for the present. It can be renewed at the conclusion of the whole case.

Mr. ROBERTSON.—Exception.

The WITNESS.—We spoke to the defendant, called him "Joe" and walked in. He looked us over and we said we want a drink. I said that. He nodded to the bartender. He went to the further end of the bar and behind the cigar-case. The bartender served us three drinks for which I paid seventy cents, and the bartender rang it up in the till. I wish to correct that, I paid one dollar. It was moonshine whiskey fit for beverage purposes and contained more than one-half of [33] one per cent of alcohol.

We then left and Agent Edholm and I came back alone on the 10th of July. We spoke to defendant, saying, "How do you do, Joe?" He was behind the cigar-case and there was a different bartender than the night previous behind the bar. I asked the bartender for a drink of moonshine whiskey and he served us two drinks of moonshine. I paid seventy cents. It was rung up in the cash register.

At 10:00 P. M. Agent Edholm and myself returned and purchased a drink of moonshine whiskey

(Testimony of Leonard Regan.)

from the bartender. I paid for the first drink, seventy cents, and asked the bartender, a man by the name of Martin, for a pint of liquor. He sent a man to get it to the rear of the establishment. The defendant was present behind the bar. When the man was gone after the pint bottle of liquor, Agent Edholm bought a drink of moonshine whiskey. The man came back, handed the bottle to Martin and I gave Martin a five dollar bill and he rang two dollars and a half in the cash register and returned me two and a half in change and gave me the bottle.

I can identify this as the bottle I secured on that occasion.

Mr. GARVIN.—I offer this.

Mr. ROBERTSON.—If the Court please, I object to the introduction of this liquor in evidence upon the ground that there is no allegation of agency or association or anything of that kind or character in this case, and the proof shows, if anything, a purported agency or something of that kind or character of which the defendant had no notice in this charge. I move to strike, further, all of the evidence with relation to sales of moonshine whiskey, upon the ground that the testimony of this witness now discloses if any sales were made to him, they were made by a person other than this defendant, and there is no charge in this information which would have informed this defendant of the nature and character of the allegation against him, and it is a variance from the allegation made

in the information that the sales were made by the defendant to this witness. [34]

Mr. GARVIN.—If the Court please, while in one sense some of the statements of counsel are true, the facts have established this from the testimony of the witness: that the defendant was in charge of the place at the time; that the other man was a bartender; that it is a soft-drink parlor, a public place in the city of Spokane; first of all there was a conversation with reference to the purchase of intoxicating liquor, which was served; the money which was given in payment for the intoxicating liquor served was rung up in the cash register; that all of these transactions were in the presence of the defendant, in his place of business, the place over which he has control and management. I will say this in fairness, I expect to go further, not by this witness, as to who was the then proprietor of the place on that particular date.

The COURT.—I will deny the motion for the present. Counsel can renew it, if he cares to, at the conclusion of the case.

Mr. GARVIN.—And my motion will be granted for an identification of this?

The COURT.—Yes.

Mr. ROBERTSON.—Your Honor will grant me an exception at this time?

The COURT.—Yes.

(Thereupon the said bottle was handed to the clerk and marked Plaintiff's Exhibit No. 1 for identification.)

(Testimony of Leonard Regan.)

There was nothing further done on this occasion, the night of the 10th.

Cross-examination.

(By Mr. ROBERTSON.)

I first met Mr. Dukovitch on the 9th day of July, 1923, I was introduced to him. The other man said, "Hello, Joe," and we said, "Hello, Joe." I met this other man on Main Street, within a block or two of this resort. I met him in the investigation we were making, part of the investigation, and asked him if he knew where we could get a drink, and he said he did. This was on the street. I spoke to him first. He was down in that part of the town and he looked favorable, that is, as if he knew where we could get a drink. I could not tell you how [35] that is. I do not know what his name is, I did not want to know his name because he was only serving a purpose for me. I did not hear his name called by the defendant when he said "Hello, Joe," to him. I did not hear his name called by Martin. I did not do anything to keep from hearing his name.

Mr. Dukich was on the outside of the place and this was the first time I had ever met him. I had seen him a number of times before that on my visits to Spokane on different investigations. I remember no particular time. I cannot recall how many times I saw him, he is a man very easily to be remembered. I had seen him two or three times at other places and had seen him twice when going by his place of business. I cannot remember

(Testimony of Leonard Regan.)

how many times I have seen him, he is a man very easily recognized. I have never seen him at any other place except on Main Street or standing in front of his place. This was in Spokane about six months ago.

Q. Now, I will ask you, Mr. Regan, if on the 10th day of February, 1922, at about eight o'clock P. M., you were in the Marga Bar, on the corner of Main and Brown Avenue—and Brown Street?

A. I believe I did have a case against that at that time. I would have to go back to my records to refresh my recollection. I have handled a good many hundred cases since then.

Q. I will ask you if on that occasion you saw Joe Dukich?

A. I can not recall at that time now.

Q. I will ask you, Mr. Regan, if on the 24th day of April, 1922, you testified as a witness in this courtroom, in the case of a man by the name of Stanley Jukich?

A. I did. I believe I did, as near as I can remember. I have testified in so many cases I cannot remember the names without going back to my notes.

Q. I will ask you if this man Joe Dukich was not a witness on that trial, and sat up in that chair and testified in your presence for some time?

A. I do not remember the case of Stanley Jukich and do not remember [36] Joe Dukich testifying as a witness in that case or remember seeing him. I do not remember seeing Stanley Jukich and Joe Dukich and having a conversation with them after

(Testimony of Leonard Regan.)

that case in the hall outside the courtroom. When we first went in the bar on the 9th, the first thing that was said was when I asked for a drink after we had exchanged greetings. The greetings were, as we said, "Hello, Joe." The man who was with us did not say anything to Joe about where he met me. We said "Hello, Joe," we went to the bar. Joe was not the bartender. Joe preceded us and went around the cigar counter. We went to the bar. We did not ask the defendant, who was behind the cigar counter, for a drink.

Q. The first thing you said then that you wanted a drink was addressed to the bartender?

A. Yes, sir.

The bartender at that time was behind the bar, I don't recall which part of it, and the defendant was behind the cigar counter and did not go to the place where the bartender was. There were two or three men in the room. Men were coming in and going out. We were there just a few minutes.

Q. Now, when you asked for this drink, Mr. Regan, who was the one who made the request?

A. I did.

Q. You spoke in a loud tone of voice?

A. No, sir.

Q. In a low tone of voice? A. Yes, sir.

Q. And so that only the bartender and you who were there in the immediate circle could hear it, I assume?

A. I spoke in an ordinary tone of voice.

Q. Didn't you just answer that you spoke in a low tone of voice?

(Testimony of Leonard Regan.)

A. Well, I didn't. You asked me if I spoke in a loud tone of voice. I spoke in an ordinary conversation, I did not holler. [37]

I paid the money for the drink to the bartender Martin.

Agent Edholm and I went back there again on the 10th at about five P. M. There was a strange man behind the bar. We went up to the bar and asked for a drink of moonshine. The bartender served us. The defendant was standing at the cigar counter talking to somebody who looked to be foreigners. My request for the drink was made to the bartender who served us without any further ado, after we had exchanged greetings with Mr. Dukovitch, our greetings being simply, "Hello, Joe."

We came back about 10:30 that night, said "Hello, Joe," and he answered "Hello." He was behind the cigar counter surrounded by a group of countrymen conversing. I did not interrupt the conversation or gathering. I went down further on to where the bartender was, asked him for a drink and he served us with one. I paid for the first drink. Agent Edholm paid for the second. After I purchased a drink, I asked the bartender for a bottle. He spoke to a man in front of the bar in some foreign language and the man proceeded to the rear of the room, went into some room or closet and while he was gone, Agent Edholm said, "Let's have another drink," and the bartender served us. Agent Edholm paid. The man returned with the bottle, gave it to the bartender, the bar-

(Testimony of Leonard Regan.)

tender passed it over to me, I gave him five dollars and he rang up two dollars and a half and returned the change. During this time the defendant was at the cigar counter. Two or three men were talking to him. I had no conversation with him that night other than to say, "Good-night," to him. I do not know where the man went who went to the rear of the room other than that he opened a door. I do not know where he went after opening it.

Redirect Examination.

(By Mr. GARVIN.)

Q. Mr. Regan, for the purpose of refreshing your recollection, do you recall the case of the United States vs. Stanley Dukich, in which you and Mr. H. J. Stetson, who was a prohibition agent at that time under Mr. Roy Lyle, before you got into the service as a general [38] agent, testified?

A. I believe I do.

Q. In order to refresh your memory, do you remember you originally testified on the case here and had to leave for Seattle and you took Mr. Stetson down there with you? A. Yes, sir.

Q. Do you now recall the case which Mr. Robertson referred to. A. I do recall the case now.

Q. Did you have any distinct recollection of this man from that incident or not?

A. I did not, because he was not the defendant. He was a witness. I do not remember the witnesses. I would remember the other man, Stanley.

(Testimony of Leonard Regan.)

Recross-examination.

(By Mr. ROBERTSON.)

When I went to the Marga Bar on the 9th of July I had entirely forgotten that I had been in that place before and arrested Stanley Jukich. I had forgotten the place and everything else at that time.

Redirect Examination.

My ordinary duties as an agent, in addition to investigations, are not confined to any one particular place, I have four states and Alaska and am travelling from place to place, and since the early spring of 1922, I have handled possibly one hundred and fifty to two hundred cases.

Testimony of Oscar V. Edholm, for the Government.

OSCAR V. EDHOLM, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a general prohibition agent with headquarters at Seattle. I met the defendant in July, 1923, at the Marga Bar, at 45 Main [39] Avenue about nine o'clock in the evening, with Agent Regan and another gentleman whose name I do not know, whom we met somewhere down the street. After I arrived at this place we went in and Mr. Regan bought a drink of moonshine whiskey. The defendant was back of the cigar counter at that time.

(Testimony of Oscar V. Edholm.)

Q. Did you have any conversation, or did Mr. Regan or this other gentleman have any conversation with him with reference to the purchase of any liquor?

* * * * *

Q. The drinks were ordered from the bartender.

Mr. GARVIN.—Q. I know, but I am asking you now, Mr. Edholm, please pay attention to my questions. You are not excited are you, now?

A. I do not think so.

Q. * * * Did you have any conversation with the defendant with reference to liquor, or did Mr. Regan, that you heard?

A. I did not have any direct. When we met Mr. Dukich we said we came up for a drink.

Q. All right, then what?

A. We went to the bar and we were served.

We came back the second day, about the 10th of July, about five o'clock in the afternoon, Agent Regan and I, and bought a round of drinks from a different bartender than was there before. We spoke to the defendant, he was behind the cigar counter. We came back later at ten o'clock and there was a bartender by the name of Martin. We bought a round of drinks of moonshine whiskey. Defendant was back of the cigar-case, towards the front of the bar. The cigar-case runs right up to the edge of the bar. He was behind it and the bartender was down the bar where the drinks were served.

Q. Then what took place?

(Testimony of Oscar V. Edholm.)

A. Mr. Regan asked the bartender for a pint of whiskey. The bartender spoke to a man who disappeared through the rear of the [40] hall and came back in about a minute with a bottle of moonshine whiskey, which was delivered to Mr. Regan, who paid for it. The defendant at that time was somewhere in the front of the bar, leaning against the back end of the case.

Cross-examination.

(By Mr. ROBERTSON.)

I don't recall where we met the man that we went to the bar with, nor what his name was, nor do I recall hearing him addressed by name.

When we went in the defendant was in front of the bar and went in and took a position in back of the cigar counter. There was nothing further passed between us and the defendant and this other man except greetings before we went up to the bartender to ask for a drink, that I can recall, and when we went up to the bartender, the defendant was behind the cigar counter and the bartender was behind the place at the bar where the drinks were being served. He was about the middle of the bar, he might have been a little ways towards either end. My estimate is that the bar is about twenty feet and the cigar counter about seven or ten feet, and that the defendant was about the center of the cigar counter.

On our third visit there, the defendant was back of the cigar counter. The bartender served us a drink of moonshine. This was the evening of July

(Testimony of Quintard Johnson.)

10th and is the time when the man went out for the bottle. I do not know where he went to, he went out the back way.

Testimony of Quintard Johnson, for the Government.

QUINTARD JOHNSON, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am the City Chemist for the city of Spokane and made an examination of Plaintiff's Exhibit No. 1 and it contains fifty per cent alcohol and is fit for beverage purposes and is commonly [41] known as moonshine whiskey.

Testimony of Warren E. Beltz, for the Government.

WARREN E. BELTS, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a General Prohibition Agent with headquarters at Seattle. Plaintiff's Exhibit No. 1 was in my possession in the sheriff's vault and I brought it over to this building, to this trial.

Mr. GARVIN.—I move for the admission of Plaintiff's Exhibit No. 1 for Identification.

Mr. ROBERTSON.—I have my objection to that as stated before to the Court.

(Testimony of D. E. Dunning.)

The COURT.—The objection will be overruled.
It will be admitted.

Mr. ROBERTSON.—Exception.

(Thereupon the bottle heretofore marked for identification was received in evidence as Plaintiff's Exhibit 1 admitted, and is made a part hereof.)

Testimony of D. E. Dunning, for the Government.

D. E. DUNNING, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am secretary to the Commissioner of Public Safety and City License Inspector, and make investigations of different places such as soft drink parlors, granting licenses, and I am familiar with 45 West Main Avenue, known as the Marga Bar. The proprietor is Joe Dukich, and was proprietor in the month of July, 1923, and secured a license.

Mr. GARVIN.—The Government will rest.

Mr. ROBERTSON.—I move to strike from the consideration of the jury all of the testimony of the witnesses in the case relating to the purchase of drinks of alleged intoxicating liquor in the Marga Bar. [42]

(2) I move to strike and withdraw from the consideration of the jury all of the evidence relating to the purchase of the bottle of alleged moonshine liquor from the bartender at the Marga Bar.

(3) I move the Court to instruct the jury to return a verdict of not guilty upon the count one of the indictment, on the ground that the evidence legally competent as against this defendant is not sufficient to go to the jury upon the question of his guilt or the possession of a pint of intoxicating liquor.

(4) I move the Court to instruct the jury to return a verdict of not guilty as to the second count of the indictment, upon the ground that the evidence is insufficient to justify submitting it to the jury upon the question of the defendant's guilt as to that count of the indictment.

(5) I move, further, to strike all of the evidence in the case relating to the purchase of intoxicating liquors upon the ground that there is a variance between the allegations of the information and the proof;

Upon the further ground, that the information is totally insufficient and inadequate to notify the defendant of the particular charge against him, failing to state or allege that the sale of intoxicating liquors was made by a person other than the defendant, and failing to allege any connection between the defendant and the person who is now claimed to have made the sales.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4149.

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation Re Denial of Motions to Strike and
Withdraw Evidence from Jury, etc.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the printed record may be amended to show that the motions made on pages 49 and 50 thereof were each and all denied by the Court, and that an exception to the denial of each of said motions was taken by defendant's counsel.

E. W. ROBERTSON,
Attorney for Plaintiff in Error.

H. SYLVESTER GARWIN,
Attorney for Defendant in Error,
Assistant United States Attorney.

[Endorsed]: No. 4149. United States Circuit Court of Appeals for the Ninth Circuit. Joe Dukich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Stipulation Re Denial of Motions to Strike and Withdraw Evidence from Jury, etc. Filed Jan. 3, 1924. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Testimony of Joe Dukich, on His Own Behalf.

JOE DUKICH, being called as a witness and being first duly sworn, testified in his own behalf as follows:

Direct Examination.

That he knew the witness Leonard Regan and knew that he was a Government Prohibition Agent, having testified as a witness for the defense in a case in which said Regan had been a witness for the Government, and having seen and heard the said Regan testify in that case. [43]

That the witness Regan and Edholm were not in his place of business in July, 1923, when he was present; that if they had been he would have recognized Regan. That no intoxicating liquors were sold to them by a bartender or anyone else in his presence and that he did not authorize any bartender either to keep or sell intoxicating liquors.

(Argument by Mr. Garvin.)

(Argument by Mr. Robertson.)

(Reply by Mr. Garvin.)

Charge to Jury.

The COURT.—Gentlemen of the Jury, it now becomes the duty of the Court to explain to you the issues in this case and to instruct you upon the rules of law by which you are to be guided in your deliberations, and it is your duty to accept these instructions as correct and so far as the law of the case is concerned to be guided by them.

The information in this case accuses the defendant, Joe Dukich, first, with the offense of the unlawful possession of intoxicating liquor, and in count two with the unlawful sale of intoxicating liquor to one Leonard Regan, the act of possession alleged to have been on the 10th day of July, 1923, and the act of sale to have been on the same day.

In this connection, Gentlemen of the Jury, I instruct you that by possession as used in count one of this information is meant the physical custody of the thing in question, coupled with the authority of dominion and control over it, and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich. [44]

Intoxicating liquor, as I have many times instructed this jury, is liquor suitable for beverage purposes, and which contains more than one-half of one per centum of alcohol by volume.

In the second count of this information the crime alleged is that of unlawful sale of intoxicating liquor, and by sale is meant transfer of title to property from one person to another for a consideration. In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender

and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale. Please bear in mind that in order to constitute the guilt of the defendant arising out of the sale by Martin it is necessary for you to find that Mr. Dukich was actually present and that he aided and counseled and assisted or concurred, or advised or participated in the transaction committed by the man Martin, and you must further find that the liquor was in fact sold, and you must find that the liquor sold was intoxicating liquor, that is, that it contained more than one-half of one per centum of alcohol by volume. If you find from the evidence that at the time the sale was made the defendant Dukich was not present, then your verdict should be not guilty, and even though you find that the defendant was physically present at the time, if you further find that he did not aid, counsel, abet, encourage, assist, advise or participate in the transaction, you will find the defendant not guilty.

To these charges in this information the defendant has interposed a plea of not guilty, and the effect of that plea is to cast upon the Government the burden of establishing each and every of the

essential elements of this crime to your satisfaction and [45] beyond all reasonable doubt.

The defendant is presumed to be innocent of the crime with which he is charged, and that presumption is one of his important and substantial rights. It is guaranteed to him by the laws of the land. It attaches to him and continues with him throughout all stages of the trial and throughout all stages of your deliberations as jurors until it has been met and overcome by the evidence in the case and his guilt has been established to your satisfaction beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds him.

By reasonable doubt as used in these instructions is meant a doubt which is based upon reason. It is defined to be such a doubt as, if entertained by a person of ordinary prudence, sensibility and decision in transacting the graver and more important affairs of life, would cause him to hesitate or waiver before acting. It must be a real and substantial doubt and must arise out of a fair, honest-minded consideration of the evidence in the case, or from the lack of evidence. If after carefully considering and comparing all of the evidence in the case you are able to say upon your oaths as jurors that you have an abiding conviction to a moral certainty then you are satisfied beyond all reasonable doubt. If you are unable to say that you have such an abiding conviction, then you do entertain a reasonable doubt, and any such doubt should be resolved in favor of the defendant.

If you find from the evidence beyond all reasonable doubt that on the time and on the occasion referred to in the evidence that Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense [46] of the possession of intoxicating liquor. If you have a reasonable doubt as to the fact of his guilt having been established, or of the proof of any essential elements of the crime, you should resolve that doubt in his favor and find him not guilty.

If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty. If you entertain a reasonable doubt of his guilt having been established, under that charge, or as to the proof of any fact necessary to constitute his guilt, you must find him not guilty.

It will require the concurrence of the entire jury to return a verdict.

You are the sole and exclusive judges of the facts and of what weight and credit you will grant to the testimony of the several witnesses who have appeared before you and in that task you are at liberty to and should take into consideration the conduct and demeanor of the witnesses upon the witness-stand; you should take into consideration the intelligence or lack of intelligence manifested by the witnesses; the probability or improbability of the story told by the witnesses; the opportunity or lack of opportunity that the witness may have of knowing and being informed concerning the matters to which he testified; the apparent candor and frankness of the witness in testifying or the lack of those qualities, if any such appears; the interest that any witness might have in the outcome of the case, if any; anything disclosed from the witness-stand which, in your judgment, would cause him to color or warp his testimony one way or the other; in short, all of the facts and circumstances surrounding the witness indicated on the witness-stand, and in the light of all these give to the testimony of each witness that fair, reasonable weight and consideration which in your honest-minded judgment as practical men [47] it is reasonably and justly entitled to receive.

Have I omitted anything?

Mr. ROBERTSON.—I desire to reserve an exception to that portion of your Honor's instruc-

tions which said that if the man Martin had a pint of intoxicating liquor in his possession, that the defendant Dukich could be found guilty of such possession on the part of Martin. I do not remember the exact wording of the instruction, your Honor, but I desire an exception to that.

I desire to except to that portion of your Honor's instruction which further says if the defendant had in his employ a man named Martin, and that this man Martin sold intoxicating liquors in the defendant's presence, and the defendant counseled, aided, and so forth, that the defendant might be found guilty.

I desire to except to the latter part of your Honor's instructions, stating if the jury found from the evidence that the bartender had in his possession intoxicating liquors, and the defendant knew of its possession, that he would be found guilty.

And the further subsequent instruction with relation to the finding of the defendant guilty on sales by Martin.

The COURT.—All right.

(Thereupon the bailiffs were duly sworn to take charge of the jury.)

The COURT.—Gentlemen of the Jury, this case is now finally submitted to you. You may retire to your jury-room and consider of your verdict.
[48]

Certificate of Judge to Bill of Exceptions.

State of Washington,
County of Spokane,—ss.

I, J. STANLEY WEBSTER, United States District Judge for the Eastern District of Washington, and the Judge before whom the above-entitled action was tried, to wit: the cause entitled United States of America, plaintiff, vs. Joe Dukich, defendant, which is No. C.-4350 in said District Court, DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of the said Court and thereafter duly and regularly served within the time authorized by law; and that no amendments were proposed to said bill of exceptions excepting such as are embodied therein; that due and regular written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time (not less than three days nor more than ten days after the service of

said notice) to settle and certify said bill of exceptions.

Dated at Spokane, Washington, this 14th day of November, 1923.

J. STANLEY WEBSTER,
Judge. [49]

In the District Court of the United States for the Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. Joe Dukich, Defendant. Bill of Exceptions. Filed in the U. S. District Court, Eastern Dist. of Washington. Nov. 13, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy.

[Endorsed]: No. 4149. United States Circuit Court of Appeals for the Ninth Circuit. Joe Dukich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received November 19, 1923.

F. D. MONCKTON,
Clerk.

Filed November 26, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

